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Respectfully submitted,

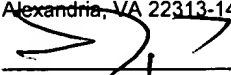
A handwritten signature in black ink, appearing to read "Richard T. Lyon". The signature is stylized with a large, sweeping "S" shape for the first part of the name.

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**CERTIFICATE OF MAILING**

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 Date: 10-3-03  
Richard T. Lyon

*#33 Appeal Brief*  
*10/19/03*  
*NSM*

PATENT  
Docket No.: GTW-048-99

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE  
BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of  
Tash

: Group Art Unit: 3751  
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Entitled: IMPROVED TOILET AND  
SINK DRAIN PLUNGER

: Examiner: R. Fetsuga  
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Serial No.: 08/637,894

Filing Date: April 25, 1996

**APPEAL BRIEF**

**REAL PARTY IN INTEREST**

The subject application is owned in its entirety by the Tash Family Trust formally known as "GEORGE TASH and DEBRA B. TASH, as Trustees of the Community Trust created under the GEORGE TASH AND DEBRA B. TASH INTER VIVOS TRUST AGREEMENT, dated November 25, 1985, as amended and totally restated on May 19, 1999".

**RELATED APPEALS AND INTERFERENCES**

10/08/2003 AWONDAF1 00000053 08637894

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There are no known related appeals or interferences.

### **STATUS OF THE CLAIMS**

On July 3, 2003, appellant appealed from a final rejection of Claims 1-4, 6 and 9-17. This final rejection was included in an Office Action dated April 9, 2003 (Paper No. 29), which also objected to claims 7 and 8 as depending from rejected claims. Claim 5 was previously cancelled. A copy of the claims involved in this appeal is provided in an appendix hereto.

### **STATUS OF AMENDMENTS**

The appellant filed an amendment under 37 CFR 1.116 concurrently with the present appeal brief. This amendment proposes changes to the drawings to resolve objections to the drawings and related objections to the disclosure pointed out in the final Office Action dated April 9, 2003 (Paper No. 29). As of the filing of this brief the amendment has not been acted upon by the Examiner.

### **SUMMARY OF THE INVENTION**

Referring to Figures 1-3, the present invention involves a toilet and sink plunger having an elongated handle (12) connected to the top of a depending open-bottomed bellows (22) in the sidewalls of which are formed a vertically stacked series of interconnected horizontal pleats (34). The plunger further includes a series of three sealing rings of a shape, size, and location such that it will efficiently seal against a toilet or sink drain hole regardless of the size or shape of the hole, thereby providing a more effective suction and driving force for the plunger when it is operated to clear the drain of an obstruction. The three sealing rings include an upper first ring-shaped seal (32), a bulbous annular curved second ring-shaped seal (36), depending from the first ring, and a third bottom ring-shaped seal (38) which depends from the second seal. The seals are ring-shaped and of progressively smaller diameter from the uppermost

ring to the lowermost ring. The second ring-shaped seal (36) is also of a substantially greater height than the first (32) and third rings (38), and exhibits a continuously curved bulbous shape with its lower end of less diameter than its upper end. The bulbous curved shape of the second ring (36) is essential to achieving the expressed goals of the sealing ring arrangement—namely the capability of being used efficiently on both sink drain holes and toilet drain holes, particularly toilet drain holes of drastically different configurations (see Fig. 5 and the description found at Page 9, line 18 through Page 10, line 12 of the appellant's specification).

### **ISSUES**

Claims 1-2, 6, 9, 10, 11, 13, 14, and 16 were rejected under 35 USC 102(b) as being anticipated by Scarella (French publication 2540943). In addition, Claims 3, 4, 12, 15 and 17 were rejected as being unpatentable under 35 USC 103(a) over Scarella, and Tash (presumably U.S. Patent No. 4,745,641). And finally, Claims 1-4, 6, 9 and 10-17 were provisionally rejected as being unpatentable under 35 USC 103(a) over Scarella and Tash as applied to Claims 1-4, 6, 9 and 10-17, and further in view of Locke (U.S. Patent No. 1,644,436).

### **GROUPING OF CLAIMS**

Claims 1-4, 6 and 9-17 stand or fall together.

### **THE EXAMINER'S RATIONALE**

The Examiner's rationale for the rejection of Claims 1-2, 6, 9, 10, 11, 13, 14, and 16 under 35 USC 102(b) was that:

“the Scarella reference discloses a plunger comprising: a handle 3; a bellows 5; and three ring-shaped seals 7 (and at 8), as claimed. Re claim 13, one of the seals is capable of being larger than an opening of a sink or drain depending upon the size of such opening which is not structurally recited in

the claim. Further in regard, note the English language translation at page 5, lines 21-23. Re claim 1, the seals are annular, curved and bulbous as illustrated. Re claim 2, it is well settled that process limitations in a product claim can not operate to distinguish a claimed product from a prior art product when the prior art product otherwise equates with the claimed product structure. Re claim 6, the bottom seal (at 8) includes a short vertical sidewall (between 8 and 9).”.

The Examiner's rationale for the rejection of Claims 3, 4, 12, 15 and 17 under 35 USC 103(a) over Scarella and Tash was that:

“although the Scarella plunger is not plastic, as claimed, attention is directed to the Tash reference which discloses an analogous plunger which further is plastic (col. 2 ln. 64 and col. 3. lns1-2). Therefore, in consideration of Tash, it would have been obvious to one of ordinary skill in the art to associate plastic with the Scarella plunger in order to utilize a commonly available moldable material. Re claim 17, constructing the handle and bellows of a plunger as “unitary” is also taught to be desirable by Tash at column 2, lines 58-63.”.

And finally, the Examiner's rationale for the provisional rejection of Claims 1-4, 6, 9 and 10-17 as being unpatentable under 35 USC 103(a) over Scarella and Tash, and further in view of Locke was that:

“although the ring seals of the Scarella plunger are not continuous, as disclosed, attention is directed to the Locke reference which discloses an analogous plunger which further includes continuous ring seals 12. Therefore, in consideration of Locke, it would have been obvious to one of ordinary skill in the art to associate continuity with the Scarella ring seals in order to facilitate drain engagement.”.

Furthermore, the Examiner stated that the appellant's arguments for patentability presented in a response to the first Office Action issued against this present application after filing of a RCE (i.e., Paper No. 25), which rejected the aforementioned claims for the similar reasons, were not persuasive because:

"Applicant argues at pages 5-11 of the response the structures 7,8 are not seals as claimed. The examiner can not agree. Noting the translation of Scarella at page 5, line 19 through page 6, line 11, structures 7 and 8 indeed are seals."

### **ARGUMENT**

In essence, it is the appellant's contention that none of the cited references alone, or in combination teaches a toilet and sink drain plunger having the claimed three seal arrangement. The following arguments will show this to be true for each of the aforementioned rejections in turn. As none of the cited reference teaches the claimed seal arrangement, the rejected claims are patentable under 325 USC 102 and 35 USC 103.

#### **The Rejection under 35 USC 102(a) of Claims 1-2, 6, 9, 10, 11, 13, 14, and 16.**

It was contended in the final Office Action that Scarella teaches all the elements of the appellant's invention recited in Claims 1-2, 6, 9, 10, 11, 13, 14, and 16, including the three sealing ring arrangement. The appellant respectfully disagrees with this allegation of anticipation.

The appellant claims three sealing rings of a shape, size, and location such that the claimed plunger will efficiently seal against a toilet or sink drain hole regardless of the size or shape of the hole, thereby providing a more effective suction and driving force for the plunger when it is operated to clear the drain hole. Specifically, an upper annular curved ring depending from the lowermost portion of the bellows of the plunger is claimed as the first sealing ring. The second sealing ring claimed is a bulbous annular curved ring that

depends from the first sealing ring. This second seal is claimed to be smaller than the first sealing ring. The third sealing ring is claimed to be attached to the second ring and smaller in diameter than said second seal. Thus, three separate, sequentially-connected and progressively smaller sealing rings are claimed as part of the appellant's toilet and sink plunger.

Scarella teaches a plunger having just two sealing structures. Specifically, as evidenced by the translation of Scarella that is of record in this application, the reference teaches a first sealing structure (6) and a second sealing structure (9)--and no others. The first sealing structure (6) is described in Scarella starting on Page 5 of the translation, at line 19 and continues to Page 6, line 3. This section states:

“Structure 6. Conical body, slightly deformable through internal pressure. Function. The conical body, especially designed to penetrate inside toilet bowl traps, is graduated outside with ribs, marking, and indicating the penetration  $\Phi$  (*a symbol apparently meaning depth or diameter*), suitable for each bowl model. These ribs are used for anchoring, they prevent the cone from slipping during the operation of heavy compression. Under pressure, cone 6 inflates slightly, and its outer part adheres against the inside of the trap, it takes on its shape, and creates a seal.”.

It is noted that the ribs referred to in the foregoing passage from Scarella are the seals 7 the Examiner contends equate with one of more of the applicants claimed sealing rings. However, it is clear from the passage that these ribs are not seals. Rather they function as markings to tell the user how deep to insert the conical body (6) into the toilet bowl, and as anchors to prevent the conical body from slipping when the plunger is compressed. However, they do not seal the plunger to the trap of the toilet. This is the task expressly stated to be performed by the conical body upon it being inflated under pressure (e.g., as would occur when the plunger is compressed). Thus, Scarella clearly does not teach that the ribs (7) each provide individual sealing capability as implied by the Examiner in contending they equate to one or more of the claimed sealing rings, or that they are seals

at all. In fact, the reference expressly states they have a different purpose all together. It is further pointed out that the ribs (7) described in Scarella do not depend from each other or form an integral unit as claimed by the appellant. Rather they are by design segregated structures.

The aforementioned second sealing structure (9) is described in Scarella starting on Page 6, at lines 17-24. This section states:

“Structure 9. The sealing contact lips characterized by the bottom in the form of a suction cup. Their 1<sup>st</sup> function is to adhere to the plumbing fixtures’ plugs to avoid that the compression strength does not escape at the time when the air is injected into the trap. In the case of increased resistance from the obstructing blockage, they are used as escape valves, and release the air contained in the plunger.”.

This is the only other structure of the Scarella plunger that is taught to be a seal. Granted, the Examiner contends that cylindrical portion (8) equates to the bottom sealing ring claimed by the appellant. However, with respect, this is clearly not the case. The cylindrical portion (8) is not a seal of any kind. As described in Scarella on Page 6, lines 6-16:

“Structure 8. Cone 6 is extended by a cylindrical portion 8 with bellows. Its 1<sup>st</sup> function is to orient, and push the lips 9 at the bottom of the device in order to make the plunger seal when the form of the plumbing fixture, or the position of the plug do not allow placing the plunger perpendicularly. Its 2<sup>nd</sup> function. This cylinder is characterized by the fact that it has a  $\Phi$  smaller than the maximum width found at 5. The cylinder enables retaining the aspirated water when the plunger works with hydraulic pressure, and the lips 9 have lost contact with the bottom of the device.”.

Thus, in essence the cylindrical portion (8) is simply an extension that is used to place and secure the sealing lips (9) to the bottom of the toilet (presumably within the trap). It is possible that the Examiner may have misinterpreted the second function of the cylindrical portion (8) as being some type of seal. However, the description merely refers to the fact that since the cylindrical portion (8) has a smaller diameter than the upper bellows portion of the plunger (5), water that has been drawn into the interior of the plunger body is trapped and cannot exit even if the seal provided by the lips is broken, as is the case with the prior art plungers described on Page 3, lines 10-12. Thus, the cylinder acts to retain the aspirated water so that hydraulic pressure can be exerted on the blockage when the plunger is compressed. This has nothing to do with sealing the plunger to the toilet. It might also be that the Examiner confused the small ridge around the outside of the cylindrical portion (8) as a seal since the lead line identifying the cylindrical section points right to it. However, this ridge is not a seal, but the external wall of an internal annular slot that is used to seat a cap structure 11 of an unrelated transfer pump embodiment of the Scarella device shown in Fig. 5.

Accordingly, it has been shown that Scarella teaches only two sealing structures, not three or more, and that the cylindrical portion (8) does not equate with the claimed bottom sealing ring of the appellant's invention.

Further, neither of the two seals taught in Scarella can be considered to have the claimed bulbous annular curved shape of the second sealing ring. The conical body (6) of Scarella has a cone shape with straight sides. It is neither bulbous or curved. The claimed bulbous curved shape of the second ring is essential to achieving the expressed goals of the claimed three sealing ring arrangement—namely the capability of being used efficiently on both sink drain holes and toilet drain holes, particularly toilet drain holes of drastically different configurations (see Fig. 5 and the description found at Page 9, line 18 through Page 10, line 12 of the appellant's specification).

A prima facie case of anticipation is established only when the Examiner can show that the cited reference teaches each of the claimed elements of a rejected claim. In this

case, the Examiner cannot show that the Scarella reference teaches the three sealing ring arrangement claimed by the appellant. Thus, the rejected claims recite a feature that is not taught in cited art, and as such a prima facie case of anticipation cannot be established. Accordingly, rejected Claims 1-2, 6, 9, 10, 11, 13, 14, and 16 are patentable under 35 USC 102(a) over Scarella based on the following novel claim language, i.e.:

“A toilet and sink drain plunger comprising...toilet and sink drain hole sealing rings integral with the lower end of said bellows, said sealing rings comprising...an upper annular curved first ring depending from the lowermost portion of said bellows cooperating therewith to form on the outer surface a first drain hole seal; a bulbous annular curved second ring depending from said first ring, located relative to said first ring to form on its outer surface a second seal smaller than said first seal; and, a third bottom ring secured to the underside of said second seal, smaller in diameter than said second seal, the outer surface of said bottom ring forming a third seal, said seals being integral with each other and said bellows and having a central opening therein communicating with said bellows space.”.

**The Rejection under 35 USC 103(a) of Claims 3, 4, 12, 15 and 17.**

Claims 3, 4, 12, 15 and 17 were rejected as being obvious over Scarella and Tash. It was contended that although the Scarella plunger is not plastic, the Tash reference discloses this feature, thereby making it obvious. In addition, it was contended that while the Scarella reference did not teach a unitary handle and bellows, Tash discloses this feature, thereby making it obvious. The appellant respectfully disagrees with these allegations of obviousness.

As explained above, the Scarella reference teaches only two sealing structures and lacks a teaching of the claimed bulbous annular curved shape of the second sealing ring. The sealing ring configuration is essential to achieving the expressed

goals of the claimed plunger—namely the capability of being used efficiently on both sink drain holes and toilet drain holes, particularly toilet drain holes of drastically different configurations. The Tash reference also lacks a teaching of the claimed three sealing ring configuration with its bulbous annular curved shaped second sealing ring. Only one of the preferred plunger embodiment described in Tash has more than two seals, and that embodiment (i.e., the embodiment depicted in Fig. 4) lacks the bulbous, curved second seal claimed by the applicant. To the contrary the region of this embodiment associated with the second seal (42b) exhibits a generally concave, inward sloping shape and has diameter that appears to be smaller than the bottom seal (52) of the plunger. Clearly, the seal arrangement taught in Tash is not structurally the same as the claimed sealing ring arrangement or able to function in the same way owing to the lack of the second bulbous, curved sealing ring and smaller diameter bottom sealing ring of the claimed plunger.

Thus, the claimed plunger has advantageous features not taught by the combined teachings of Scarella and Tash, even if the Scarella plunger were molded of plastic, and the handle and plunger are molded as a unitary structure. In order to deem the applicant's claimed invention unpatentable under 35 USC 103, a prima facie showing of obviousness must be made. To make a prima facie showing of obviousness, all of the claimed elements of an applicant's invention must be considered, especially when they are missing from the prior art. If a claimed element is not taught in the prior art and has advantages not appreciated by the prior art, then no prima facie case of obviousness exists. The Federal Circuit court has stated that it was error not to distinguish claims over a combination of prior art references where a material limitation in the claimed system and its purpose was not taught therein (*In Re Fine*, 837 F.2d 107, 5 USPQ2d 1596 (Fed. Cir. 1988)).

As the appellant has claimed elements not taught in the cited art and which have advantages not recognized therein, no prima facie case of obviousness has been established in accordance with the holding of *In Re Fine*. This lack of prima facie showing of obviousness means that the rejected claims are patentable under 35 USC

103 over Scarella and Tash. As such, Claims 3, 4, 12, 15 and 17 are patentable under 35 USC 103(a) over Scarella and Tash based on the previously-quoted claim language.

**The Provisional Rejection under 35 USC 103(a) of Claims 1-4, 6, 9 and 10-17.**

Claims 1-4, 6, 9 and 10-17 were provisionally rejected as being unpatentable under 35 USC 103(a) over Scarella and Tash as applied to Claims 1-4, 6, 9 and 10-17, and further in view of Locke. It was contended in the final Office Action that it was considered obvious to make the sealing rings continuous as taught by Locke.

It is noted that only Claims 3, 4, 12, 15 and 17 were rejected under 35 USC 103(a) over Scarella and Tash. Accordingly it is not clear what is meant by Claims 1, 2, 6, 9, 10, 11, 13, 14 and 16 being "provisionally rejected as being unpatentable under 35 USC 103(a) over Scarella and Tash as applied to Claims 1-4, 6, 9 and 10-17, and further in view of Locke. For the purposes of this appeal brief it will be assumed the Examiner meant that Claims 1, 2, 6, 9, 10, 11, 13, 14 and 16 were provisionally rejected under 35 USC 103(a) over Scarella as applied to Claims 1, 2, 6, 9, 10, 11, 13, 14 and 16, in view of Locke.

The applicant respectfully disagrees with the foregoing contentions of obviousness because, in essence, none of the cited references teach the applicant's claimed three sealing ring configuration with its bulbous annular curved shaped second sealing ring. It has already been shown the Scarella, as well as the Scarella and Tash combination, lack a teaching of these features. Locke also lacks such a teaching. Specifically, Locke teaches a drain cleaning device having a cup (3) with a side wall portion (11) that is constructed of thin, flexible rubber and forms a series of annular corrugations (12), which exhibit progressively smaller diameters towards the bottom of the device. These corrugations, which appear in Fig. 2 of the reference to be narrow protrusions having a semi-circular profile, allow the cup wall to be compressed and to expand in the axial direction and to allow its lower end to be wedged into a drain

opening to seal it when water pressure is applied (see Col. 2, lines 69-79 and lines 105-109).

It is the appellant's position that Locke, while perhaps teaching a continuous series of seals, does not teach the claimed three sealing ring configuration with its bulbous annular curved shaped second sealing ring. Fig. 5 of the drawings in the present application demonstrates how the claimed second seal ring engages a drain. This type of sealing engagement is enhanced by the bulbous, curved shape of the second sealing ring because it allows a tight seal to be formed with a variety of drain openings, even those that are of a slightly graduated diameter. Locke is simply lacking this structure and its narrow semi-circular seal is not capable of providing the versatility in interfacing with a wide variety of drain sizes as is the claimed bulbous curved shape of the appellant's second sealing ring. Thus, when the teachings of Locke are combined with the Scarella device, which also does not teach the claimed sealing rings, the unique second bulbous sealing ring is still missing. Moreover, Tash also does not teach the unique second sealing ring, as explained previously. Accordingly, adding Tash to the combination does nothing to change the fact that a teaching of the unique second sealing ring is still missing. There is no disclosure whatsoever in any of the cited references that is structurally similar to the present claimed sealing rings. In addition, none of the cited references disclose plungers, which perform as does the present claimed plunger to efficiently seal a drain hole regardless of its particular contours. Thus, the claimed sealing rings also have advantages that are not appreciated in the cited art.


In view of the above, the appellant has claimed elements not taught in the cited art, which have advantages not recognized therein. As a result, no prima facie case of obviousness has been established in accordance with the holding of *In Re Fine* in regard to the Scarella and Locke combination for Claims 1, 2, 6, 9, 10, 11, 13, 14 and 16. Similarly, no prima facie case of obviousness has been established in regard to the Scarella, Tash and Locke combination for Claims 3, 4, 12, 15 and 17. This lack of a prima facie showing of obviousness means that the rejected claims are patentable under 35 USC

103 over Scarella in view of Locke, and over Scarella and Tash in view of Locke. As such, Claims 1-4, 6, 9 and 10-17 are patentable based on the above-quoted claim language.

### **SUMMARY**

For the foregoing reasons, it is submitted that the Examiner's rejection of Claims 1-4, 6 and 9-17 was erroneous, and reversal of the Examiner's decision is respectfully requested.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Richard T. Lyon', with a stylized flourish at the end.

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PATENT  
Docket No.: GTW-048-99

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE  
BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of Tash	:	Group Art Unit: 3751
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Entitled: IMPROVED TOILET AND SINK DRAIN PLUNGER	:	Examiner: R. Fetsuga
	:	
	:	
Serial No.: 08/637,894	:	
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Filing Date: April 25, 1996	:	

**APPEAL BRIEF APPENDIX**

The following Claims 1-4 and 6-17 represent all of the claims involved in the appeal of the above-identified application and are provided in accordance with the requirements of 37 CFR 1.192(c)(7).

1. A toilet and sink drain plunger comprising:
  - a) a handle;
  - b) a bellows secured to said handle; and,
  - c) toilet and sink drain hole sealing rings integral with the lower end of said bellows, said sealing rings comprising,
    - i. an upper annular curved first ring depending from the lowermost portion of said bellows cooperating therewith to form on the outer surface a first drain hole seal;

ii. a bulbous annular curved second ring depending from said first ring, located relative to said first ring to form on its outer surface a second seal smaller than said first seal; and,

iii. a third bottom ring secured to the underside of said second seal, smaller in diameter than said second seal, the outer surface of said bottom ring forming a third seal, said seals being integral with each other and said bellows and having a central opening therein communicating with said bellows space.

2. The toilet and sink drain plunger of claim 1 wherein said plunger bellows and seals are of unitary construction, having been integrally joined together in a single molding operation.

3. The toilet and sink drain plunger of claim 2 wherein said bellows and seals are of flexible resilient plastic.

4. The toilet and sink drain plunger of claim 3 wherein said handle is detachable from said bellows and also of plastic.

6. The toilet and sink drain plunger of claim 1 wherein said bottom seal includes an upper bulbous annular ring portion and a lower portion having a short vertical sidewall of smaller diameter than said upper portion.

7. The toilet and sink drain plunger of claim 6 wherein each said ring includes an inwardly and downwardly curved lower part adapted to sealingly engage a toilet or sink drain hole and wherein said second ring is of substantially greater height than said first and third rings and of a continuously curved bulbous shape with its lower end of less diameter than its upper end.

8. The toilet and sink drain plunger of claim 7 wherein the lower end of said plunger is horizontal to enable said plunger to rest in an upright position.

9. The toilet and sink drain plunger of claim 1 wherein said bellows includes sidewalls comprising a plurality of integral, vertically stacked, interconnected, horizontally extending pleats capable of nesting during compression of said bellows to a collapsed state, and wherein said pleats are more flexible than said seals.

10. A toilet and sink drain plunger comprising, in combination:  
a) a handle;  
b) a bellows which includes a plurality of horizontally extending pleats; and,  
c) three toilet and sink drain hole seals disposed on the outside of said plunger in horizontally extending vertically stacked relation, said three seals being ring-shaped and of progressively smaller diameter from the uppermost to the lowermost of said three seals, each said seal having a sealing surface.

11. The toilet and sink drain plunger of claim 10 wherein said handle is vertical and at the upper end of said plunger, wherein said bellows is secured to the bottom of said handle and depends therefrom and wherein said seals are integral with the lower end of said bellows.

12. The toilet and sink drain plunger of claim 11 wherein said handle, bellows and seals are of plastic.

13. The plunger of Claim 11 wherein one or more of the three seals is slightly larger than an opening of a standard sink or drain.

14. The plunger of Claim 13 where one or more of the three seals is sufficiently flexible to deform inwardly when inserted into a standard sink or drain opening in order to form an interference fit, thus producing a mechanical seal with a wall defining the drain opening

15. The plunger of Claim 11 wherein the bellows section is formed of flexible resilient plastic.

16. The plunger of Claim 11 wherein said handle is releasably connected to said bellows.

17. The plunger of Claim 11 wherein said handle is of unitary construction with said bellows.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'R. T. Lyon', written over the printed name.

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